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IN THE

Supreme Court of the United States.

October Term, 1906.

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JAMES H. McKENNEY,

CHARLES S. LANDRAM, and
JOHN A. BROADDUS,
Executors, et al, Appellants,
vs.
GABRIELLA K. JORDAN, *Appellee.*

No. 179.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

Dr. Thomas Kearney, of San Antonio, Texas, died testate July 5, 1896, leaving as his heirs-at-law, two children—a son, Edmund Kearney; and a married daughter, Mrs. Constance Kearney Vertner, of Luray, Virginia. Mrs. Vertner was a widow with three children, all minors —a daughter, Lillie Kearney (now Mrs. L. K. V. Jones, of Baltimore), and two sons, Edmund Kearney and Thomas Kearney. All three children are now of age.

The testator's son, Edmund Kearney, died June 4, 1898, leaving a widow and no child. His sole heir-at-law, his sister, Mrs. Vertner, died at Luray, June 6, 1904, during the progress of this litigation. Her executors have been made parties to the record.

The real estate which Dr. Kearney undertook to dispose of by will consisted of (1) a house and lots in San Antonio; (2) A valuable ranch property, of 68,888 acres, in Webb

County, Texas; (3) A house at Luray, in which his daughter, Mrs. Vertner, was living; (4) A vacant lot on 20th Street, near F, n. w.; (5) Eight dwelling houses on F Street, n. w., above 20th Street, and (6) Two houses, 611 and 613 M Street, n. w., all in Washington.

The will, executed about a month before Dr. Kearney's death, is a voluminous document, covering thirteen pages of the printed record. (Rec., 8–22.)

The testator appears to have gone to great pains to ensure the comfortable maintenance of his daughter, the support and education of his grandchildren, and the partial support of his niece, Gabriella K. Jordan, this appellee. He creates a trust, in terms indicating a lack of confidence in the ability of his daughter, Mrs. Vertner, to take care of property.

The Texas ranch land, the value of which he says is at least $2.50 per acre, is to be sold at an early day, and after the youngest grandchild, Thomas K. Vertner, shall arrive at the age of twenty-two, three-fifths of the proceeds are to be distributed, share and share alike, to the three grandchildren, and one fifth to Mrs. Vertner.

In order to make sure that Mrs. Vertner and her children shall enjoy means of support, whatever may prove to be the result of their having this Texas ranch money put into their hands, the testator sets apart the Washington dwelling houses (except 611 M Street), and directs the trustees upon collecting the rents to maintain a fund in bank of $1,000, out of which they are to pay Mrs. Vertner a monthly allowance, and to support, educate and maintain the three grandchildren. This trust, the testator directs, shall continue until the 1st of January, 1928. Of course, if a beneficiary dies the trust ceases, as to him; although the will does not say so in express terms.

The testator evinces a strong affection for his niece, Miss Jordan. He prescribes how her comfort shall be assured

by means of an annuity, modest indeed in amount, compared with the fortune designed for his grandchildren.

Item 6 of the will reads as follows:

"I hereby authorize and direct that my said trustees shall, during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, n. w., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of forty dollars for each and every month, it being my desire that she shall have a regular income of at least forty dollars per month and that the same shall be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof." (Rec., 10.)

Upon Miss Jordan's death, the fee simple title to the house and lot, 611 M Street, is to vest in the testator's grandson, Thomas K. Vertner; but should Miss Jordan die before the 1st of January, 1928, the trustees will continue to hold the title until that date, paying the net rents to Thomas K. Vertner.

He directs that the rents of all the Washington property be placed in a common fund, except the rent that is to go to Miss Jordan. This common fund is to be maintained for a period named, and thereafter each grandchild is to receive the rents from separate shares of the real estate. The trustees are to pay taxes, repairs and insurance, out of the income of the Washington real estate, except that derived from the house known as 611 M Street, n. w., "which shall be paid to my niece, as provided in item 6 hereof." (Rec., 11.)

The trust, as before stated, ceases on the 1st of January, 1928, and the title to houses and lots specified vests in each of the three grandchildren, with the proviso that if Constance K. Vertner is living on the 1st of January, 1928, then the titles do not vest in the grandchildren until the death of their mother.

The will named Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Mississippi, as joint trustees. The former declined to accept the trust, and Judge Drake has acted as sole trustee.

Judge Drake, on the 15th of May, 1900, filed a bill in the Supreme Court of the District of Columbia, as acting trustee under Dr. Kearney's will. (Rec., 7–22.) He set forth that questions had arisen as to the validity of the provisions in the will relating to real estate in the District of Columbia, and that he had been advised that these provisions are void, "because they attempt to create a perpetuity."

The prayer of the bill was—

"That by decree of this honorable court, the last will and testament of Dr. Kearney, deceased, be construed, so far as the same deals with the real estate within the District of Columbia therein devised."

The complainant filed a copy of the will as an exhibit. Constance K. Vertner, defendant, answered on the same day that the bill was filed, namely, May 15, 1900. She averred that the will was void as to real estate within the District, for the reason that its provisions attempt to create an estate contrary to the law of perpetuities.

The bill named Miss Jordan (this appellee) as one of the defendants. Her answer, filed without counsel, is as follows:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will and as she is not advised as to the law governing

such matters and things therein set forth, she prays the Court to make such a decree herein as will protect her rights in the premises, and to this end admits the matters and things in said bill of complaint to be true." (Rec., 23.)

Miss Jordan at that time was a résident of New York, and she still resides there. Only one counsel appeared in the suit. He was solicitor for the complainant. A *guardian ad litem* was appointed for the Vertner children, May 22, 1900, and he on that day filed a formal answer. On the 23d May, 1900, a replication was filed joining issue, and the cause was calendared for a hearing of bill and answers. (Rec., 24.)

In the following month, the Court entered a decree as follows:

"This cause having been calendared, was submitted on the pleadings filed therein and duly considered; it is, by the Court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs-at-law. JOB BARNARD, *Justice.*" (Rec., 24.)

As this sweeping decree purported to render null and void the trust created by Dr. Kearney for his niece, thus destroying the annuity of forty dollars per month provided for her in the will, Miss Jordan, on the 29th of October, 1901, filed a bill of review in the Supreme Court of the District of Columbia, setting forth wherein she was injured by the decree, and praying that said decree be reviewed

and set aside, and that she be permitted to remain in the undisputed enjoyment of the rents derived from the real estate, as provided in the 6th item of the will. (Rec., 1–6.) The trustee, Drake, and the defendants, Constance K. Vertner and her daughter, Lillie K. Vertner, then being of age, demurred. Upon a hearing, the Justice below (ANDERSON) overruled the demurrers.

The Justice, instead of setting aside the decree, modified it to the extent of declaring the devise of the annuity to Gabriella K. Jordan valid. (Rec., 46.)

Mrs. Vertner died, and her executors having been made parties to the record, they with Lillie K. Vertner, and Drake, trustee, appealed to the Court of Appeals. That Court affirmed the decree of the Supreme Court with costs. (Rec., 57.) Judge Drake did not appeal, but the executors of Mrs. Vertner, with Lillie K. Vertner, having been allowed to sever, took an appeal to this Court. (Rec., 58.)

POINTS OF LAW.

The Court of Appeals was right in affirming the decree of Mr. Justice Anderson, giving this appellee relief upon her bill of review. We submit, however, that the scope of that decree may properly be enlarged so as to set aside entirely the decree of 27th June, 1900 (Rec., 24), improvidently entered by Mr. Justice Barnard.

The points upon which we rely are as follows:

1. The annuity given in trust to Miss Jordan is for her lifetime, and the gift is valid. It may be readily separated from the other trusts, even if these other trusts shall be found to be in violation of the statute against perpetuities.

2. Mr. Justice Barnard was without jurisdiction to entertain the suit, and the decree entered by him is null and void.

3. All the trusts in the will are valid, and this Court may properly modify the decree of the Court below, so as to require that the Court of first instance shall entirely set aside the decree of 27th of June, 1900.

I.

The Annuity Given in Trust to Miss Jordan is Valid.

Let us assume for the moment that Mr. Justice Barnard had jurisdiction of the subject matter of the suit, and that in some respects the decree entered by him is valid. We contend that, in so far as this decree pronounces void the provision for the monthly support of Miss Jordan during her natural life, it was erroneous. The direction that the trust for the grandchildren is to cease 1 January, 1928, has no application to the provision for the testator's niece. The trust for her benefit is to continue "during the natural life of my beloved niece, Gabriella K. Jordan."

In item 8 (Rec., 11) instructions are given to the trustees as to what they are to do "upon the death of my said niece, Gabriella K. Jordan." The direction is that the trust is to outlive, or at least to continue in being beyond the last moment of the life of, Miss Jordan.

Again in item 21 (Rec., 20,) the directions are that on 1 January, 1928, the trustees shall cease to hold "the title and ownership of the Washington property *not hereinbefore disposed of*," and the same is to be vested.

Here we have distinct and unmistakable language from the testator to the effect that his intention is to preserve the trust, and the holding of the property by trustees for the benefit of Miss Jordan for the period of her natural life, whether she live beyond January, 1928, or die before that date. Moreover, the testator gives explicit instructions as to what shall be done provided his niece happens to die be-

fore 1 January, 1928 (Item 8, Rec., 11), it being apparently unnecessary to say what shall follow her living beyond that date, since the trust for her benefit is to exist during the entire period of her natural life.

This trust is separable from the others.

The only question to be considered is whether this independent trust may be so separated from the rest of the will that it can be upheld, notwithstanding that the other trusts of the will are found to be illegal. As to this point there seems scarcely room for doubt.

The legacy to Miss Jordan is not "essential to the general scheme." See language of the Court in *Manice vs. Manice*, 43 N. Y., 307. It is an independent bequest, having nothing whatever to do with the tying up of the real estate in other parts of the will.

If effect cannot legally be given to the entire will, or to an entire provision in a will, any part of it may be sustained which is conformable with the rules of law, provided it can be separated from the residue without doing violence to the testator's general intention. *Oxley vs. Lane*, 35 N. Y., 349.

There may be separate trusts, or there may be a single trust that has more than one purpose. If one of these purposes be good, the courts will sustain the will to this extent, although another purpose, being in violation of the statute, fails. *Harrison vs. Harrison*, 36 N. Y., 54. A good illustration is seen in *Tiers vs. Tiers*, 98 N. Y., 568. The rule is familiar that Courts will use every effort to sustain a will and carry out a testator's intention, where it can be done by separating what is legal from what is illegal.

Per Allen, J., *Van Schuyver vs. Mulford*, 59 N. Y., 432.

"Where an estate is vested under a will in a trustee upon several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statute against perpetuities, the estate of

the trustee will be upheld to the extent necessary to enable him to execute the valid trust, and will only be void as to the illegal or invalid trust."

The question is a practical one whether the testator's directions with respect to the trust for the benefit of his niece present the features of a lawful, or of an unlawful trust. Inasmuch as the gift to Miss Jordan has nothing to do with the devise to the others, but is a distinct and independent gift for the lifetime only of the *cestui que trust*, there is no reason why the testator's intention should not be carried into effect.

II.

The Court was without Jurisdiction to Pass Upon the Validity of the Trust.

The decree of Judge Barnard declaring void the provisions of the will creating a trust respecting lands in the District of Columbia (Rec., 24) was a nullity. The Court had no right to proceed with the suit. It should have dismissed the bill for want of jurisdiction.

Our brief in the Court below raised this point, but the Court declined to consider it. We were ready to show that the devise in trust did *not* violate the statute against perpetuities; and, moreover, that Judge Barnard had no jurisdiction to entertain the suit.

But the Court of Appeals declined to hear argument, on this point. The Court was of opinion that while "the suit was indeed an extraordinary one," this appellee had no direct interest in the question of the validity of the general trust which rendered its determination necessary or even proper.

We can not but think that the Court below in reaching this conclusion fell into error. One of the reasons set forth in the bill of review for affording relief to the complainant

is found upon page 5 of the Record; "because said Court had *no jurisdiction* upon the merits of said case, and for that reason said bill should have by said decree been dismissed."

The prayer of the bill of review is that said final decree may be reviewed and *set aside* and no further proceedings be had thereon. (Rec., 6.)

It is always open to show that a decree complained of was rendered by a court that had no jurisdiction to render it. True, in one aspect of the appeal, it may not have been *necessary* to decide the question of the jurisdiction of Judge Barnard's Court, since the decision could be placed upon the ground that the trust for Miss Jordan is separable from the other trusts of the will. But the decree improvidently entered by Judge Barnard is likely to lead to trouble and must prove a trap to the title-searcher. At some future day the question of its validity is sure to come up. Now is a good opportunity to set to rest any doubts by an authoritative declaration on the subject.

Besides, Dr. Kearney's express intention ought to be sustained if the court shall be of the opinion upon examination that the provisions of his will in the premises are valid.

The Court of Appeals has said: "All of the parties whose interests were directly and materially affected by that part of the decree have not only acquiesced in it, but have appeared in this Court also in its support."

Of course, Mrs. Vertner, the heir-at-law, acquiesced in it, for she had everything to gain by so doing. But Dr. Kearney meant that this real estate should be preserved for a period of years during the lifetime of the grandchildren, so that they could rely on its proceeds for support. The wishes in the premises of these grandchildren could not be effectually placed before the Court, since they were represented by a guardian *ad litem*. There is urgent reason, therefore, that this mistake be corrected, to the end that the true effect of Dr. Kearney's devise be announced by a Court, upon

argument of counsel, and after full opportunity for a deliberate expression of the Court's opinion of the law.

We propose to dicuss the grounds for holding the decree to be void. There are two reasons and to some extent they are bound up together.

1. The bill on its face discovers a doubt as to the existence of a trust. Unless the existence of a trust is declared in positive terms, a court of equity has no right to proceed with the case.

2. The trustee applied to the Court for an expression of opinion as to the validity of a trust, and for nothing else. He sought no direction for the enforcement of the trust. A court of equity will not entertain a suit whose sole purpose it is to obtain the construction of a will.

I.

The bill did not allege the existence of a trust. Such allegation was necessary to give the Court jurisdiction.

There is no inherent power in equity to construe devises. *Mellen vs. Mellen*, 139 N. Y., 210.

Chancery deals with a will only by way of furthering the administration of some trust that the testator has created. It may be considered as settled law that the jurisdiction of equity in the construction of wills rests wholly upon the trusts which the will has brought into being. In other words, the general jurisdiction of equity over trusts finds something for a court of equity to *do* in respect to the trust features of the will.

Mr. Pomeroy pronounces this conception of the sources of jurisdiction in equity as to construction of wills to be "a doctrine which seems to be both in harmony with principle, and sustained by the weight of authority." *Equity Jurisprudence*, Sect. 1156.

He quotes the views of ALLEN, J., in *Chipman vs. Montgomery*, 63 N. Y., 230, as follows:

"It is by reason of the jurisdiction of the Courts of Chancery over trusts that courts having equitable powers as an incident to that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when courts are moved on behalf of an executor, trustee or *cestui que trust*, and to insure a correct administration of the power conferred by will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will, and the jurisdiction is incidental to that over trusts."

This language is employed in a case where an heir-at-law undertook to maintain an action in equity to obtain construction of a will, the Court holding that he had no right to maintain such a suit. In a later case, PECKHAM, J., after reviewing the decisions, says:

"The jurisdiction of courts of equity in construing doubtful or disputed clauses in a will has been held with entire uniformity by the Courts of this State to result from its jurisdiction over trusts, and that exists only when the Court is moved on behalf of an executor, trustee or *cestui que trust*, and to enforce a correct administration of the power conferred by the will." *Anderson vs. Anderson*, 112 N. Y., 110.

A recent text-writer upon the subject of wills has stated the law in similar terms, namely, that the power of equity to entertain an action for the construction of a will rises wholly out of the jurisdiction over trusts. *Underhill on Wills*, Sect. 455.

It may be well to refer to what Mr. Pomeroy conceives to be "a broader and different doctrine" for sustaining the right, in a small group of cases. He says:

"The broader doctrine is that the jurisdiction rises from the complicated character of provisions in a will; from the difficulty in understanding their meaning, or the doubt and

uncertainty as to the rights and interests of the parties claiming under them. In short the jurisdiction exists and is exercised whenever its terms are really difficult or doubtful, or their validity is contested without reference to the presence or the absence of any trust."

This language does not yield much satisfaction upon close inspection. It amounts to saying that courts of equity, in States where the "broader doctrine" is maintained, take jurisdiction of the construction of a will when the language of a testator really needs interpretation. The necessity of resort to a court of equity is thus made a reason for the assumption of jurisdiction by the court in the premises.

Of the cases cited by Mr. Pomeroy to sustain the text, we have found only one, *Baldwin vs. Bean*, 59 Me., 481, that, as we conceive, supports this view. This case involved the meaning of a statute providing that the court should have jurisdiction as a court of equity to determine the construction of wills. The Supreme Court of Maine, after some doubts, arrived at the conclusion that the legislature meant that parties in interest should have the right to take the opinion of the Court as to the legal effect of a will, even in advance of any actual controversy.

Other authorities cited will be found to be instances where the courts of equity in that particular State have been invested with all the powers of the High Court of Chancery of England, including the administration of estates. We are unable to agree with Mr. Pomeroy that the difficulties and doubts contained in a will are sufficient for the taking of jurisdiction by the courts in these cases. An examination of the report in each case will disclose the fact that under the Constitution of the State, courts of equity had been invested with full powers; and the court that Mr. Pomeroy refers to was of opinion that the establishment of a probate court had not taken from the equity

court its jurisdiction over the administration of trusts. In this country the rule is that the Probate or Orphans' Court has full power of administration. At any rate, the "broader doctrine" class does not include the District of Columbia; and it is not needful further to consider it.

The equity powers of the Supreme Court of the District of Columbia are those possessed by the Maryland Court of Chancery, 27 February, 1801, that is to say, the powers of the High Court of Chancery of England, save so far as the institution of probate courts had shorn our courts of chancery of jurisdiction over the administration of estates. See language of the Court in *Ferris vs. Highley*, 20 Wall, 382.

The jurisdiction of the Supreme Court of the District of Columbia to construe a will, therefore, grows out of the trust created by the testator. It can be referred to no other source.

No statute against perpetuities in District.

The decree declares the provisions of the Kearney will to be "contrary to the statute in such cases made and provided." (Rec., 24.) No statute in the premises was in force in the District at the date of the decree. The Maryland Statute of Wills, of 1798, does not meet the language of the decree. It provides that "no will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation or appoint to any uses not permitted by the constitution or laws of the State." *Ould vs. Washington Hospital*, 95 U. S., 308. Had a statute existed in the District of Columbia, in 1877, when the Ould case was decided, that governed perpetuities, it would have been cited in the opinion; but SWAYNE, J., after discussing the statute of Elizabeth in regard to charities, concludes with this pertinent remark: "The controversy must be determined upon the general principles of juris-

prudence, and the presence or absence of the statute cannot affect the result" (p. 310).

What was in force in the District when Judge Barnard entered his decree was a restriction created by judicial decision; and the "statute-made-and-provided" clause of his decree must, therefore, be regarded as inadvertently admitted. The period, let us add, is a life or lives in being and twenty-one years, with a fraction of a year added for the term of gestation, in cases of posthumous birth.

No need to have will construed.

Dr. Kearney had devised real estate in the District of Columbia, to Taylor and Drake, trustees, upon trusts clearly set forth. There can be no doubt as to the meaning of the testator's language. Nobody needed to ask a construction of the will, in the sense of ascertaining what the testator intended by his words.

Judge Drake, describing himself as the sole trustee under the will, applies to the Court asking that the will be construed. In a half-hearted way this trustee complains of having been advised that the trust is void, and he says that he would like to have the Court tell him whether or not the trust provisions are valid. On the face of the pleadings doubt is raised by the trustee himself whether any trust has been created by the will. Unless there be a trust a court of equity has no jurisdiction to enter upon a consideration of the case made in the complaint. A complaint, setting out a will, and asking that a construction be given to it to see if it creates a trust, does not state facts to give equity jurisdiction. *Edgar vs. Edgar*, 26 Oregon, 65.

So, where a plaintiff takes certain clauses of a will containing trust provisions, and seeks to have them declared invalid, the suit does not give an equity court jurisdiction upon the ground that a trust is involved. *Jones vs. Rich-*

ards, 54 N. Y. S., 126. Chancellor WALWORTH stated in the leading case of *Bowers vs. Smith*, 10 Paige, 200, (1843) that he was "not aware of any case in which an heir-at-law of the testator, or a devisee who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will."

These authorities abundantly show that it is necessary for a court of equity first to be assured that the subject matter of a trust is before it in order to warrant its proceeding to take jurisdiction.

Trustee had no right to file his bill.

By accepting the trust and entering upon its duties, Judge Drake took upon himself the responsibility of defending the provisions of the will as to real estate in the District of Columbia. A trustee must always defend his trust. *Perry on Trusts*, Sect. 433; *Ellis vs. Barker*, 7 Ch. App., 104. Upon accepting the office of trustee, it became the duty of Judge Drake to protect the estate against any person who should deny the validity of the trust. The heir-at-law, being the person chiefly interested to defeat the testator's purpose, had her remedy by ejectment.

At page 5 of the record will be found Section *c* of paragraph 9 of the bill of review. This section is a statement of one of the particulars in which complainant avers that the decree was erroneous. The language of Section *b* is as follows:

"Because the institution of the said suit by the said trustee under said will was a breach of his said trust and of the confidence reposed in him, whose duty it was to defend the title and interest of the *cestui que trust*, Gabriella K. Jordan, thereunder, and a court of equity cannot lend its aid to the commission of said breach."

The Court will observe that the bill of review is signed by another solicitor than ourselves. If the record were extended it would show that after we had come into the case in the place of the former counsel, we consented that Section *b* be stricken out of the bill. We did this because we believed that Judge Drake had no thought of violating his duty as trustee.

Section *c* of that paragraph, however, remained in full force:

Because said Court *had no jurisdiction* upon the merits of said suit, and for that reason said bill should have by said decree been dismissed. (Rec., 5.)

This act of the trustee, extraordinary in its nature and unknown to the practice of equity respecting trusts, was such that the court ought not to have taken jurisdiction.

Bearing in mind that the substance, and not the form of a proceeding of this character is to be regarded, we point to the language of the court in the carefully considered case of *Chipman vs. Montgomery*, already cited. That was an action brought by heirs-at-law and next-of-kin for the construction of a will. The court said that it was in reality an attempt to obtain possession of real property without resorting to an action of ejectment. The chief point in controversy was the validity of a residuary devise.

After announcing that the court was without jurisdiction, because an heir-at-law has no right to apply to a court of equity for the construction of a will, his claim being contrary to the will, the Court proceeds to discuss the principle that a party who contends that a trust in the will is invalid cannot resort to an alleged existence of that trust for the purpose of deducing therefrom the right of a court of equity to take jurisdiction. ALLEN, J., says:

"It is true that counsel for plaintiffs, while alleging the invalidity of the residuary clause of the will, did claim that

if it was valid a trust was created in which they have a remote and contingent interest; and that by reason of such trust the Court had jurisdiction of the action, and that as an incident of that jurisdiction could pronounce on the validity of the clause creating the trust, and adjudge them entitled as heirs-at-law and next-of-kin to the destruction of the trust and the overthrow of the entire will. The plaintiffs cannot entitle themselves to the intervention of the instrument while occupying such a position. They cannot for the purpose of giving the Court jurisdiction, allege a trust within the general powers of the Court, and in the same breath deny the legal existence of that same trust, and insist upon legal rights inconsistent with it. The trust being invalid, the Court cannot entertain jurisdiction of the other matters. If the trust attempted to be created by the residuary clause of the will is legal, then there can be no need of a judicial construction of the instrument, for no question is made as to its true meaning or the rights of the parties. If it is invalid, as in contravention of the statute against perpetuities, then the rights of the parties are purely legal and are to be enforced as such." 63 N. Y., 231.

The reasoning is here applied to the case of an heir-at-law who confessedly had no rights under the will. A like reasoning, however, is pertinent in the case at bar. Although we have in our case a trustee expressing his doubts as to the validity of the trust, and asking the court to say whether the trust be valid or not, the action (if it can be maintained at all) must be regarded as having been brought in the interest of the heir-at-law; for the only result of pronouncing the trust void is to favor the heir-at-law.

Consequently, even if it be conceded that he can maintain such an action, the trustee is to be constrained by precisely the same considerations as those named in the extract just quoted. In *Chipman vs. Montgomery*, as well as in the present case, the rule obtains that no one, whether heir-at-law or trustee, can allege a trust and deny it at the same time. We see that an expression of doubt by the trustee,

supplemented by outright denial on the part of the heir-at-law as defendant, brings this case into the same posture as that commented upon by the Court in *Chipman vs. Montgomery*.

The suit was really that of the heir-at-law.

Besides, the record shows that while Judge Drake brought his suit nominally as trustee, the suit was really that of the trustee and heir-at-law combined. Only one counsel appears, who is the solicitor for the complainant. He files the bill and the answers on the same day, namely, May 15, 1900 (Rec., 7). Mrs. Vertner, the heir-at-law, swears to her answer 14th April, 1900 (Rec., 22), more than a month *before* the date of the filing of the bill. These dates mean that the trustee himself must have either prepared the answers in advance of filing the bill, and submitted them to the defendant; or, agreed with the heir-at-law, so that there was no real contest.

The question of the validity of the trust is a question of law with which a law court can promptly deal. All persons interested to defeat a trust under a will have their plain, adequate and complete remedy at law.

The trustee could move in the direction only of having the trust sustained and of asking the court for directions in respect to its enforcement. Had Judge Drake proceeded upon the theory of a valid trust, and asked the court for directions, as to any specific conduct by him, the court could properly have taken jurisdiction, however it might turn out afterwards as to the validity of the trust. The decree of the court in that event, even if incorrect, would have been voidable, not void. But such is not this case. The trustee only by inference alleges the existence of the trust. In the same breath he confesses to a doubt as to whether the trust be good or not. Taking such a position is equivalent to a non-allegation of the existence of a valid trust. It follows that there was not a sufficient allegation in Judge Drake's bill of the facts necessary

to bring the case within the jurisdiction of the Court. What purports to be a decree, therefore, is null and void.

2.

Courts will not entertain a suit merely for construction—with no direction to trustee.

A fatal defect in the decree is that it contains no direction to the trustee. A court of equity will not entertain a suit by a trustee unless he prays to have something done by way of administering the trust. It will not move to interpret a will and do nothing else. *Bailey vs. Briggs*, 56 N. Y., 406. The bill must specify some relief that is prayed for, and not merely ask the court what is the meaning of the words of a will. *Pomeroy Equity Jurisprudence*, Sect. 1156, and cases cited.

A bill in equity cannot be maintained simply to establish the fact of a trust, no other relief being sought, even when its existence is denied. 1 *Perry on Trusts*, Sect. 17. "We do not think", remarks the Chief Justice, in *Bailies vs. Payson*, 5 Allen, 488, "the mere declaration of a trust, when it consists merely of deciding that a certain contract has been made, and that it creates a trust, is a sufficient ground for maintaining a suit."

Two decisions in New Jersey are of similar import.

"In no case has it been asserted that the court may be asked and compelled to construe a will except as an incident to some relief which may be afforded by a decree. It has been expressly held that the court will not construe wills for the sake of giving counsel and advice to the parties; but only for the purpose of giving positive directions for the action of the trustees." Per MAGIE, Chancellor, *Hoagland vs. Cooper*, 65 N. J. Eq., 410.

Such is the language of the Court in 1903. As late as 1905 a bill came before the learned Chancellor, which

simply set forth a copy of a will, and asked the opinion of the Court as to the effect of the will upon certain after-acquired property. In dismissing the bill the Chancellor said:

"The purpose of the bill is to obtain the construction of a will with respect to the title to real estate. The only decree would be to express my opinion upon the meaning of the will in question." *Held*, no jurisdiction to construe the will. *Bevan vs. Bevan*, 59 Atl. Rep., 896.

The complaint, to obtain the construction of a will, must show that the complainant is entitled to and must pray some relief dependent on the construction desired. A suit does not lie merely to obtain the opinion of the Court. *Cory vs. Fleming*, 29 Ohio St., 147.

The *ratio decidendi* of these cases is obvious. Powers of a court of equity are not to be invoked except there is some duty for the trustee to perform. If a party seeks to ascertain the existence of a trust he will find a court of law amply equipped to enlighten him. If, however, a party asserts the existence of a trust, and needs direction for its administration, he can properly resort to a court of equity. The distinction between these two undertakings is clear. Judge Barnard had no right to enquire whether a valid trust existed under the will, and there stop. Such a right a court of equity enjoys only when it has been expressly conferred by legislative sanction.

The power of a court of equity in respect to trusts, as we have just seen, is restricted in its exercise to orders of an administrative or directory character. Its decree would necessarily contain a mandatory clause. A mere declaratory decree, expressing the opinion of the Judge as to the validity of a provision of a will, unaccompanied by a direction to the trustee what to do in the premises, is unknown to the equity practice of the Supreme Court of the District of Columbia.

For this further reason the decree (Rec., 24,) is null and void, since the Court had no jurisdiction to enter it.

III.

All the Trust Provisions of the Will are Valid.

At the outset the Court (Barnard, J.,) fell into error in determining that the provisions of Dr. Kearney's will violate the rule against perpetuities. We contend that every trust in the will is perfectly good. No one of them was meant to be continued longer than the lifetime of persons living at the date when the will was made, and when it went into effect.

Dr. Kearney "tied up" his estate, it is true ; but he did it for no longer a period than the lifetime of the beneficiary. The testator laid down wise and provident directions, the object of which was to guard young persons against loss from inexperience in taking care of property.

Had the question involved been argued of counsel, and had the case not presented the features of an amicable suit, it is probable that the learned Judge would have examined the law points involved, with the degree of care that a question of perpetuities often requires, and would have reached the conclusion that the trusts were legal.

The error into which the Court fell resulted from an assumption it would seem that because the testator had provided that a trust of realty shall continue till 1 January, 1928, it necessarily follows that the period may exceed lives in being and twenty-one years, and hence that the devise is void.

Where a future date is fixed when the trust is to end, and the estate to vest, a proper means of ascertaining its validity is to enquire whether, in the absence of an express reference to the lifetime of the beneficiary, the object of

the trust renders it needful that the trustee hold the estate longer than the lifetime. Had such an inquiry been prosecuted by the trustee, Drake, or by the Court, it would have appeared plain that in no single instance does the testator require the trust to be continued for a period longer than the lifetime of the *cestui que trust.* Upon the death of each living beneficiary, that particular trust ceases; and that too, wholly irrespective of the date designated (January, 1928,) for its termination, should the beneficiary so long live.

May not the Court have been led into error by overlooking the circumstance that no cause existed for requiring a trust to continue for the benefit of a grandchild, longer than for the life of that grandchild? The contingency that the death of Thomas K. Vertner, for instance, might happen before 1928, does not appear to have occurred to the learned Judge; and he did not take into account what effect such event would have had under the language of the will upon the further continuance of the trust in behalf of T. K. V.

"Where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation, and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation." Per SWAYNE, J., *Doe vs. Considine*, 6 Wall., 458; *Young vs. Bradley*, 101 U. S., 788.

A will need not *in express terms* provide that the particular trust for each of the beneficiaries shall cease upon his or her death. It is enough that a necessary implication exists that such was the testator's intention.

What Dr. Kearney really did was to devise to his trustees that they might hold the property, collect the rents and use the income for the support of the respective bene-

ficiaries until 1 January, 1928, provided, of course, that *the beneficiary so long lives.* Mrs. Vertner has died. The trust for her benefit ended at her death. Every trust Dr. Kearney creates ceases with the life of the *cestui que trust*, if not before.

In New York, where the law against the restraint of alienation is rigid, and where frequently trust provisions have been set aside as violative of the statute, some cases have arisen where the intention of the testator that the trust should not continue longer than the lifetime of the beneficiary has been gathered from the words of the will, and the trust sustained. See *Montignani vs. Blade*, 145 N. Y., 111, where the Court at special term held the gift void, on the ground that there was a fixed term of ten years before vesting. The general term, however, sustained the trust, and its decision was affirmed by the Court of Appeals. The testator had given certain shares of stock to his son, B., with limitations as follows:

"To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to him; if deceased, do and continue the same to his son, W., now in his eighth year of age. The dividends shall be collected when and as declared by my executors until transferred and delivered and paid to my son, or if deceased, to his son, W.; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters, L. and M., etc."

As stated by FINCH, J., the suspension was not for an arbitrary period. "In substance, the trust is for two lives or a shorter period, and cannot in any event exceed their duration."

A case in California is in point. The testator in a codicil used the following language:

"The $5000 to my niece, J. G., to be held in trust by

my executors for her benefit, and the interest is to be paid her monthly; at her death the same to be continued to her two children, H. and M., until they are each twenty-five years of age, when the $5000 shall be paid to them, share and share alike."

The court below, upon application of J. G., ordered that the $5000 be paid to her absolutely, upon the ground that the trust was void. Upon appeal the court reversed this order and held the trust to be good.

"It matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue the law against perpetuities is not violated. Thus a trust in property to pay the income to A. until he arrives at the age of forty years, would not violate the law, for every trust of necessity ceases when there is no beneficiary; and in the case instanced, it is obvious that A.'s life is the ultimate and determinative measure of duration. In no event can the trust continue longer than his life. Upon his death, before reaching the age of forty years, the trust determines for lack of a beneficiary." *Estate of Hendy*, 118 Cal., 659.

Let us for a moment examine the provisions of the will creating a trust in favor of Thomas K. Vertner, as indicating the testator's meaning in respect to each of these trusts for the grandchildren; for they are alike as regards their period of duration. All are for the lifetime of the *cestui que trust*, should the beneficiary die before January 1, 1928.

The directions amount to this: the estate that is to vest in T. K. V., *if it vest at all*, must vest in the lifetime of T. K. V., because it is given to him and to him alone. It is absurd to imagine that the testator meant that possibly the trustees shall hold the title for years after the death of T. K. V., in order that a vesting may take place in T. K. V., 1 January, 1928.

A reasonable meaning must be given to the language of a will. Dr. Kearney devised to trustees to hold till 1 January, 1928, if T. K. V. so long lives, *i. e.*, substantially the vesting, if it occur at all, must by the terms of the devise occur in the lifetime of T. K. V. If T. K. V. dies before 1 January, 1928, the trust ends by its terms at such decease.

Had there been a gift over to some other person than T. K. V., this interpretation of the testator's meaning would still be admissible; but the fact of the possibility of the death of T. K. V. within the period might have invalidated the gift over. The devise being to T. K. V. himself, there is no room for a conjecture that the testator designed the gift to take effect, irrespective of the date of T. K. V.'s death. In other words, the vesting is by the terms of the will to take place in T. K. V.'s lifetime, or not at all.

The test laid down by Gray is, "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." *Gray on Perpetuities*, Sec. 201.

If this share of the estate shall vest in T. K. V. under the will, it must do so, *if at all*, in the lifetime of T. K. V.

The rule against perpetuities is not a rule of interpretation. We first seek to ascertain what is the testator's purpose, and then look to see if the will offend against the rule of perpetuities.

This common-sense method of dealing with a will preserves in many instances a devise, where it occurs that, as a matter of fact, the testator has had no purpose in mind of offending against the rule. Such is the case with Dr. Kearney, and we respectfully submit that in no instance does his will violate the rule against perpetuities.

The Appellants' Points.

A word or two in reply to the elaborate argument of counsel for the appellants. It rests on the foundation that the testator actually intended to tie up his Washington real estate until 1 January, 1928, "absolutely, and at all events." Note the following extract from their brief.

"The trust * * * was * * * intended for the purpose of conserving this property and holding it together for a fixed period without reference to consequences (p. 20).

"Dr. Kearney plainly provides for the continuance of the trust absolutely and at all events until the expiration of the gross term" (p. 44).

"No one can read the emphatic unqualified language in which the testator provided for the continuance of the trust and doubt that he intended it to continue at all events until the expiration of the fixed term" (p. 50).

"* * * That intention being that the trust should continue at all events" (p. 50).

Counsel appear to have overlooked a few significant words in item 5.

The testator directs the trustees to hold the property, for a wise purpose, until 1928—"Subject, however, to the conditions and limitations hereinafter imposed." (Rec., 9.)

Here is a qualification of the extent of the trust. The object is to provide for the support of children, and for the property vesting in each child at a future day. What, if the child dies? What, if all the children, their mother, and Miss Jordan, all die before 1 January, 1928?

Is it not obvious that each individual trust terminates upon the death of the *cestui que trust* before 1 January, 1928, should that event occur? Is not the trust subject to the condition that each beneficiary shall live till that date? Most assuredly, yes.

Counsel ignore this limitation. They impute to Dr. Kearney a rigid purpose to have the trust continue till 1

January, 1928, *at all events*,—even if no beneficiary shall be in existence to enjoy the income of it.

The will does not say that the trust shall continue *absolutely* till that date. True, the possession and control of the property is to be "full, free and absolute" in the trustees until 1 January, 1928. But this quality of ownership is an entirely different thing from a provision requiring the property to be held *absolutely* and *at all events* until that day arrives.

Counsel are determined to impose an intention upon the testator at all hazards, even though the effect of his language is to bring us to a totally different conclusion. After informing the Court that our argument as to the death of a beneficiary is "fatally defective" (p. 49) they cite authorities to the following proposition: "The *intention* must first be ascertained and then the rule remorselessly applied." Precisely what "rule" is meant is by no means clear, but counsel at least proceed to apply their "rule" remorselessly, as witness this language:

"Applying these principles to the case at bar we see that the question is, not whether the trust would or must in fact terminate with the lives of the persons referred to, but whether the testator *intended* it so to terminate. If he did not so intend, but on the contrary intended that it should continue at all events until 1928, then the provision is void under the well settled principle just referred to irrespective of the question whether it would actually terminate before that period."

If the trust *must* in fact, from the terms of the will, "terminate with the lives of the persons referred to," how is it possible to deduce from those terms any other intention than that plainly conveyed by the words? If Dr. Kearney's words mean—*must* mean—an ending of the trust by the death of the beneficiary, how can counsel expect his assertion that the testator intended something different is going to persuade the Court to pronounce void this modest provision for the life of a favorite niece?

Dr. Kearney's intention is perfectly plain. He meant, that his "beloved niece," come what may, should be paid regularly and punctually $40 a month, even if it should take all his real estate in the District of Columbia to furnish it. Miss Jordan has been for a long period left out of this stipend. Now while answering these appellants, she learns that for her to receive this monthly payment out of an estate which counsel informs the Court is "worth possibly a quarter of a million of dollars" (p. 51) is to inflict the "grossest wrong" on the grandchildren, and subject the title to probable "deterioration, damage and loss" (p. 52). In spite of counsel's fears in case of "fire, earthquake or other misfortune," we still think that Dr. Kearney intended that Miss Jordan should have $40 a month, and that the trust in her behalf is independent of the trust for the grandchildren.

What matters it if all the real estate in the District of Columbia is held in trust to ensure the payment of the small sum of $40 per month? Courts have nothing to do with considering the size of an estate and the comparative size of a benefit derived therefrom by a *cestui que trust.* It is of the most vital importance to Miss Jordan that she punctually gets this monthly payment. She has been kept out of it long enough; and the very fact that an accumulation of back annuities must now be paid to her demonstrates the wisdom of Dr. Kearney in making this payment a charge upon his entire realty in the District.

We do not deem it needful to discuss the pertinency of the authorities cited in an attempt by counsel to show that the trust in behalf of Miss Jordan is not separable from the general trust. It is contained in a separate clause, is embodied in different language, and constitutes an entirely independent provision, designed to accomplish a result not elsewhere set forth in the will.

Counsel is pleased to argue that the direction to the trustees to pay over to Miss Jordan regularly each month

the rents of 611 M Street, an income of $40 per month (the trustees to add a sufficient amount to make up $40, if the rent is less than that sum) "does not create a trust for Miss Jordan" (p. 25). She is simply, so the argument proceeds, "one of a number of beneficiaries to whom a portion of the income from the trust is to be paid monthly." (P. 25.)

They forget that the trustees are to administer this particular trust "*during the natural* life of my beloved niece;" and that certain property is set apart, and taken out of the general trust, the income of which property they are to pay over to her. Holding for the life of Miss Jordan, the trustees are not at all affected by the arrival of 1st January, 1898. They are to hold the property for her benefit so long as she lives separate and distinct as trustees for her.

Objection is made that the question of want of jurisdiction in Judge Barnard's Court cannot be raised upon a bill of review. This is true where the sole object of the bill of review is to have the decree complained of declared void for want of jurisdiction. But our bill seeks to have the trust declared valid. We have raised the point of want of jurisdiction in order to meet the argument of appellants that the trusts are void. If they are really void, Judge Barnard should have dismissed the bill.

Counsel cite *Heald vs. Heald*, 56 Md., 300, and *Neale vs. Davies*, 5 De G. M. and G., 258, to sustain the position that the trustee, Judge Drake, had the right to come into a court of equity, saying he had doubts whether he was a trustee or not, and asking to be advised if the trust be valid. The doubt entertained by the plaintiffs in the cases cited was whether they should execute a particular trust, not whether they were trustees or not. In the *Neale* suit the bill was filed against trustees, not brought by a trustee, as in the case at bar. In the Maryland case the trustee asked the Court to instruct him as to his duties. Judge Drake, on the other hand, merely enquired whether the clause of the will making him a trustee was valid. He sought no instructions.

Argument is advanced that Judge Drake alleged the existence of a trust, and then registered "directions whether said existing trust is lawful" (p. 48). The allegation of the bill was that questions had arisen as to the validity of the provisions of the will relating to real estate in the District of Columbia, and he had been advised that said provisions were void. Yet appellants complain that our contention that the bill fails to allege, or throw doubt upon, the existence of a trust, is "contrary to the facts" (p. 47). We fail to perceive how a trustee plaintiff can allege the existence of a trust, and in the same breath assert that its validity is doubtful.

Counsel object that we may not ask a modification of Judge Barnard's decree. They assign as a reason that we took no cross appeal from the decree in this suit below and therefore cannot be heard in opposition to the decree of the lower courts. We are not opposing that decree, we ask its affirmance; but we say that this Court can go further, and in order to prevent litigation and to protect titles may express an opinion upon the validity of the trusts in Dr. Kearney's will and direct that the Equity Court by its decree modify Judge Barnard's decree to the extent of upholding those trusts.

The salutary principle of equity that when a court has acquired jurisdiction for one purpose, it may go forward, and do complete justice, is not unavailable here. Miss Jordan greatly prefers that Dr. Kearney's will be sustained in its entirety. If counsel for appellants are right in maintaining that the trust in her behalf is not separable from the general trust, we shall insist that the general trust is perfectly legal and valid, and ask the Court so to determine.

We respectfully submit that the decree of the Court of Appeals be affirmed with costs, and we trust that this Court will likewise declare all the trusts of the will to be valid.

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